# In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-4
Jasper F. Williams, *et. al, Appellants*
vs.
David Zbaraz, *et. al.*

No. 79-5
Arthur F. Quern, *et al, Appellants,*
vs.
David Zbaraz, *et al.*

No. 79-491
The United States of America, *Appellant,*
vs.
David Zbaraz, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

## BRIEF AMICUS CURIAE OF THE STATE OF UTAH IN SUPPORT OF THE APPELLANTS WILLIAMS, ET AL, QUERN, ET AL, AND THE UNITED STATES

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## INTEREST OF THE AMICUS

The State of Utah has a statutory restriction which permits the use of public assistance funds for the performance of abortions only if the life of the mother is endangered. Utah Code Ann. §55-15a-3 (Supp. 1979). The constitutional and statutory propriety of this provision has been upheld by a federal district court, but an appeal from that ruling is presently pending before the Tenth Circuit Court of Appeals. *D.__ R.__ v. Mitchell*, 456 F. Supp. 609 (D. Utah 1978), *appeal pending*, Case No. 78-1675 (10th Cir.). Utah also is a participating state under the federal Medicaid program to which the Hyde Amendment applies. 42 U.S.C §1396 *et seq* (1976). Thus, Utah has a direct and immediate interest in the determination of the issues in the case at bar.

## SUMMARY OF ARGUMENT

The ruling of the court below defies the holding and rationale of *Maher v. Roe*, 432 U.S. 464 (1977) and *Poelker v. Doe*, 432 U.S. 519 (1977). In those cases this Court set the maximum and minimum limits to the range of constitutionally permissible abortion funding restrictions. The abortion funding provisions challenged in this case clearly fall within the parameters set in those cases.

Substantial deference must be given to the determination made by responsible state officials of the scope of "medically necessary" abortions that will be subsidized under state medical assistance programs. Responsible state officials have relied heavily upon the 1977 Supreme Court funding cases in enacting and retaining substantial abortion restrictions. The overwhelming majority of lower federal courts have relied heavily upon those cases in sustaining the constitutionality of abortion funding restrictions similar to those involved in the case at bar.

The ruling of the court below is fundamentally inconsistent with the basic jural postulate that underlies the constitutional doctrine of abortion privacy. The court below misapplied the

rational relation standard of equal protection analysis. If the ruling of the court below that additional medical services must be subsidized by states participating in a Medicaid program, is upheld it will have substantial ramifications that extend far beyond the abortion controversy, and will jeopardize the fiscal integrity of the entire medical assistance program.

## ARGUMENT

I. *Under the Clear Rationale of* Maher *and* Poelker, *Neither the Illinois Abortion Funding Restriction Nor The Federal Hyde Amendment is Unconstitutional.*

A. *Maher* and *Poelker* set the Maximum and Minimum Limits to the Range of Constitutionally Permissible Abortion Funding Restrictions.

The primary defect of the ruling of the court below, *Zbaraz v. Quern*, 469 F. Supp. 1212 (N.D. Ill. 1979), is that it defies the holdings and rationale of *Maher v. Roe*, 432 U.S. 464 (1977) and *Poelker v. Doe*, 432 U.S. 519 (1977). The case at bar raises essentially the same constitutional issues that were decided in *Maher* and *Poelker*, and the constitutional analysis in the instant case must conform to the holdings and the rationale of those cases.

The principal issue in the instant case is whether or not the Illinois (lifesaving only) abortion funding restriction[1] and the abortion funding restriction (lifesaving, rape or incest, or

[1]Essentially, the Illinois abortion funding restriction provides public medical assistance for only those abortions "necessary for the preservation of the life of the [pregnant] woman...." P.A. 80-1091, Ill. Ann. Stat. Ch. 23, Sections 5-5, 6-1 and 7-1 (Smith-Hurd Supp. 1979). These restrictions hereinafter are referred to collectively as "the Illinois abortion funding restriction".

It is noteworthy that approximately one-third of the states have adopted life-threatening abortion funding restrictions similar to the Illinois abortion funding restriction. See *infra*, note 6. Furthermore, the latest Hyde Amendment adopted by Congress contains (and the original Hyde Amendment contained) virtually the same abortion funding restrictions. See *infra*, note 2.

(Footnote continued.)



severe physical health damage) contained in the Hyde Amendment for Fiscal Year 1979[2] violate the equal protection doctrine when public assistance for comparable surgical procedures (e.g., childbirth services) is not similarly restricted. In *Maher* the issue decided by the Court was "whether the Constitution requires a participating State to pay for non-therapeutic abortions when it pays for childbirth." 432 U.S. at

(Footnote continued.)

Prior to the decision of the district court below the Court of Appeals had ruled that the Illinois Abortion funding restriction had to be applied so as to provide reimbursement for all abortions meeting the more liberal standards of the Fiscal Year 1979 Hyde Amendment. *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979). Thus, the ruling of the district court, on remand, on the constitutional issues effectively invalidated the judicially modified Illinois statute, i.e., interpreted to be the equivalent of the Fiscal Year 1979 Hyde Amendment (and the court intended its analysis to apply equally to the Hyde Amendment. 469 F. Supp. at 1215 n.3). However, herein "the Illinois abortion funding restriction" refers to the pre-judicially-revised "life-only" statutory scheme, while the "Hyde Amendment" refers to the more liberal provisions.

[2]The instant case deals with the Hyde Amendment to the appropriation act for Fiscal Year 1979, Pub. L. 95-480 §210, 92 Stat. 1586 (Oct. 18, 1978), which prohibited the expenditure of federal funds to pay for abortions except where (1) the life of the mother would be endangered if the fetus were carried to term, (2) the pregnancy resulted from rape or incest, promptly reported, or (3) where "severe and long lasting physical health damage to a woman would result if the pregnancy were carried to term when so determined by two physicians." See also the Hyde Amendment for FY 1978, Pub. L. 95-205 §101, 91 Stat. 1460 (Dec. 9, 1977). The original Hyde Amendment to the Departments of Labor and Health, Education and Welfare Appropriation Act for Fiscal Year 1977, Pub. L. 94-439, Title II, Section 209, 90 Stat. 1434 (Sept. 30, 1976) permited the expenditure of the funds for abortions only when the life of the mother would be endangered if the fetus were carried to term. Unless otherwise indicated, all references to "the Hyde Amendment" in the text refere exclusively to the Hyde Amendment for Fiscal Year 1979, i.e., the three-part Hyde Amendment dealt with by the district court.

The most recently enacted Hyde Amendment, for Fiscal Year 1980, permits federal funding of abortions only when necessary to save the life of the mother, or in the case of rape or incest. Salt Lake Tribune, Nov. 17, 1979, at A-7, col. 1. Since the effect of the rape or incest exception is insignificant (Secretary Califano testified that of the 2,421 Medicaid Abortions performed from February 14 through December 31, 1978, [he testified that prior to the Hyde Amendment between 250,000 and 300,000 abortions per year were subsidized under Medicaid] only 61 involved rape or incest victims, N.Y. Times, Mar. 8, 1979, at A-16, col. 1) the amendment now is effectively a "livesaving-only" abortion funding restriction.

466. The Connecticut regulation examined in *Maher* limited medical assistance for abortions during the first trimester to those medically or psychiatrically necessary. *Id.* at 466 n.2. In *Poelker*, the issue was described by the Court as being "identical in principle" with that presented in *Maher*, even though the St. Louis city policy involved in that case prohibited the performance of abortions in city hospitals "except when there was a threat of grave physiological injury or death to the mother," and the doctors and medical students staffing the Ob/Gyn clinics in the city hospitals (i.e., the persons who would be making the medical necessity determinations in most cases) were drawn exclusively from a Jesuit-operated medical school opposed to abortion. 432 U.S. at 520. Thus, the constitutional issue in the instant case parallels the issues resolved by the Court in the *Maher* and *Poelker* opinions, and the arguments adopted by the court below are no different from those considered and rejected by the Supreme Court in those cases.

In *Maher* the Court reversed the declaratory judgment of a three-judge district court that the Connecticut abortion funding restriction was unconstitutional. The Court began its analysis with the unequivocal declaration that: "The Constitution imposes no obligation on the State's to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." 432 U.S. at 469. The "fundamental" right of abortion privacy articulated in *Roe v. Wade*, 410 U.S. 113 (1973), is not infringed by a state's refusal to subsidize abortion expenses, even if it pays for the medical expenses associated with childbirth.

> *Roe* did not declare an unqualified 'constitutional right to an abortion' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.



432 U.S. at 473, 474.

Because no fundamental right was infringed and no suspect classification involved, the abortion funding restriction would be upheld if it rationally furthered a constitutionally permissible state interest. *Id.* at 470, 478. The state interest in protecting the life of the fetus was recognized to be a profound and legitimate one.

> Roe itself explicitly acknowledged the State's strong interest in protecting the potential life of the fetus. That interest exists throughout the pregnancy 'grow[ing] in substantiality as the woman approaches them.' ... The state unquestionably has a 'strong and legitimate interest in encouraging normal childbirth' ... an interest honored over the centuries.

432 U.S. at 478. And there was no question that the Connecticut abortion funding scheme, by subsidizing the high costs of childbirth, but not the significantly lower expenses of abortion, "was a rational means of encouraging childbirth." 432 U.S. at 479.

In *Poelker*, the Supreme Court, *per curiam*, applied the *Maher* analysis to the even more restrictive policy (and setting) in St. Louis. The Court itself defined the breadth of its holding in *Maher* and *Poelker* as follows: "We agree that the constitutional question presented here is identical in principle with that presented by a *State's refusal to provide Medicaid benefits for abortions while providing them for childbirth. This was the issue before us in Maher v. Roe....*" 432 U.S. 521 (emphasis added). Reversing the judgment of the Court of Appeals, the Supreme Court held that a life-saving-or-grave-physical-injury standard of "medical necessity", even when enforced at a public hospital by doctors presumably opposed to abortions, was constitutionally sustainable.

Thus, in *Maher* and *Poelker*, the Supreme Court defined the constitutionally permissible range of state restrictions on

abortion funding. In *Maher*, the Court clearly indicated that the maximum limit is *no limit*, i.e., a state constitutionally may subsidize *all* abortions, whether any medical justification for them exists or not. 432 U.S. at 480. And the language used by the court in *Poelker* suggests that the minimum limit, likewise, is *no limit*, i.e., a state may constitutionally choose to fund no abortions, even medically necessary abortions. 432 U.S. at 521. More importantly, however, the exact holding of *Poelker* clearly established that even if there is a minimum level of abortion funding which a state constitutionally must provide, it is lower or narrower than the scope of the St. Louis policy which was restricted to cases involving the threat of death or grave physiological injury to the mother.

B. Abortion Funding Restrictions, Like the Hyde Amendment, Which Are Limited to Abortions Necessary to Save the Life of the Mother, or in the Case of Pregnancy Caused by Felonious Intercourse, or Where Severe and Long-Lasting Physical Health Damage Would Result if the Fetus were Carried to Term, Fall Squarely Within the Parameters of Constitutionally Permissible Abortion Funding Restrictions.

The Hyde Amendment and other abortion funding restrictions similar to it are less restrictive (authorize funding of abortions to a greater extent) than the St. Louis policy upheld in *Poelker*. In addition to authorizing abortions under circumstances virtually identical to the circumstances permitted under *Poelker*, the Hyde Amendment additionally permits funding of abortions necessary to terminate pregnancies resulting from felonious intercourse (whether there is any medical justification for them or not). Accordingly, as a majority of the lower courts to consider this issue since *Poelker* have held, a Hyde Amendment-type of abortion funding restriction is constitutionally permissible under the holding and rationale of *Poelker* and *Maher*. See,



e.g., *Frieman v. Walsh*, No. 77-4171-CV-C, slip op. at 13-16 (W.D. Mo. Jan. 26, 1979). See cases *infra*, Part II C.

C. Abortion Funding Restrictions, Like the Illinois Abortion Funding Restriction, which Subsidize Abortions Only When the Life of the Mother is Endangered, Are Within the Range of Constitutionally Permissible Abortion Funding Restrictions Under the Rationale of *Maher* and *Poelker*.

The *Maher* and *Poelker* opinions indicate that a state constitutionally may refuse to subsidize any abortions. The declaration in *Maher* that "[t]he Consititution imposes no obligation on the States to pay the pregnancy-related expenses of indigent women, or indeed to pay any of the[ir] medical expenses," 432 U.S. at 469, suggests that the Constitution shelters no substantive right or entitlement to public assistance for an abortion, even if the abortion is desperately needed to save the life of the mother. *See Poelker*, 432 U.S. at 521; *Maher*, 432 U.S. at 480 n.13; *see also Dandrige v. Williams*, 397 U.S. 471, 485 (1970).

It would not infringe the constitutional doctrine of privacy if the state altogether refused to fund any abortions. The right of a woman to have an elective abortion for purely personal, non-medical reasons at any time prior to viability is just as fundamental as the right of a woman to have an abortion to preserve her life. See *Roe v. Wade*, 410 U.S. 113 (1973). Thus, refusal to finance the latter does not violate the constitutional right of abortion privacy any more than a refusal to subsidize the former. And since an absolute refusal to fund any abortions would not violate a "fundamental" right or involve a suspect classification, a "lifesaving-only" abortion funding prohibition would be upheld under equal protection analysis because, even if *unnecessarily* strict, it plainly would be "rationally related" to the legitimate state interests identified in *Maher*. *See* 432 U.S. at 478, 479. *See D.__ R.__ v. Mitchell, 456 F. Supp. 609, 615 (D. Utah 1978).*

Moreover, there is no significant difference between the Illinois abortion funding restriction ("lifesaving-only") and the St. Louis public hospital abortion policy upheld in *Poelker*. That policy permitted abortions when there was a "threat of grave physiological injury or death to the mother." Even if the phrase "grave physiological injury" was intended to establish a larger category of abortions than "lifesaving" abortions, the practical effect of such additional coverage is minimal. Few abortions would be permitted on the basis of "grave physiological injury" that could not be permitted under the "life-only" standard.[3] For practical purposes, the Illinois funding restriction is not more restrictive than the St. Louis City hospital policy upheld in *Poelker*.[4]

II. *Responsible State Officials And The Lower Federal Courts Have Relied Heavily Upon* Maher *and* Poelker *In Adopting And Upholding Abortion Funding Restrictions Similar to Those Invalidated By the Court Below.*

A. A Legislative Determination of the Parameters of What Constitutes "Medically Necessary" Abortions

[3] A "lifesaving-only" standard of medical necessity does not straight-jacket medical judgment. It only defines, narrowly, the *range* of medical circumstances for which public funding of abortion will be permitted. *Application* of that standard in each individual case (i.e., determination of whether the situation at hand falls within the range so defined) still depends upon the independent, professional judgment of the physician, and there is room for sound medical discretion. In making that medical judgment, the physician may consider all appropriate medical criteria. *See* the district court's Final Judgment and Order of April 30, 1979, Exhibits A and B. *See generally* D.__ R.__ v. Mitchell, 456 F. Supp. at 611-614; Woe v. Califano, 460 F. Sup. at 235. *Compare* Beal v. Doe, 432 U.S. at 441, 442 n.3, 445 n.9. Of course, the "medical necessity" standard in a funding context need not allow consideration of the non-medical factors which a "medical necessity" exception to a statute prohibiting first-trimester abortion would have to permit in order to satisfy the constitutional doctrine of abortion privacy. Doe v. Bolton, 410 U.S. 179, 192; Roe v. Wade, 410 U.S. at 153.

[4] Of the 2,421 Medicaid abortions performed from February 14 through December 31, 1978, only 385 were certified under the "severe and longlasting physical health damage" standard. N.Y. Times, Mar. 8, 1979, at A-16, col. 1. Undoubtedly many of these could have been certified under the lifesaving-only provision if it were the only category applicable.



In A Medical Assistance Program Is Constitutionally Preferable to Any Judicial Determination.

The problem with the ruling of the court below is not necessarily that the definition it promulgated of "medically necessary" abortions is a bad definition or an erroneous one. Rather, the problem is that the court nullified and enjoined enforcement of two other equally legitimate and constitutionally permissible definitions of "medically necessary" abortions enacted by the elected representatives of the people.

Clearly, the determination of how the category of "medically necessary" abortions is to be defined in a public assistance scheme calls for a legislative policy judgment. Undoubtedly there are numerous ways in which it can be defined or described, and on a scale of volition, there is no "natural" or "immutable" point that clearly defines the transition from merely "desirable" to "necessary". Even if the Constitution required the funding of "medically necessary" abortions, it could not be said that, as a matter of substantive right, a particular type of exact level of coverage is constitutionally mandated. Such detailed specificity, even under the judicially-regulated right of abortion privacy, is not a part of our Constitutional scheme.

In *Maher* the Court went to great length to emphasize the substantial discretion which state legislatures have in resolving the difficult controversy of abortion funding.

> The decision whether to expend state funds for non-therapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided.... [W]hen an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." ...

432 U.S. at 479, 480. The court further declared that "the Constitution does not require a judicially imposed resolution of these difficult issues." *Id.* at 480.

B. The States Have Relied Heavily on the *Maher* and *Poelker* Decisions in Enacting and Retaining Abortion Funding Restrictions.

Relying upon the clear rationale of *Maher* and *Poelker*, most states have adopted or reaffirmed substantial restrictions on the funding of abortions. A report entitled *Public Funding of Abortions Dominant Topic of State Laws Enacted in 1978* in an Alan Guttmacher Institute publication, *8 Family Planning/Population Reporter* 20 (April, 1977) stated that: "One quarter of all fertility-related legislation enacted by the states in 1978 concerned public funding of abortions.... All together 11 states voted in 1978 to restrict the use of their funds to pay for abortions [while two other states enacted legislation permitting funding of all or most abortions.]"[5] Another study published by the National Abortion Rights Action League/Antioch Law School *Abortion Law Reporter* reveals that as of December 12, 1978, 10 states would subsidize abortion only if the life of the mother were endangered; in 23 states abortions are subsidized under limited circumstances similar to the Hyde Amendment; another 9 states would pay for medically necessary abortions so determined by the woman's physician; and 8 states and the District of Columbia pay for virtually all abortions.[6] Thus, as of one year ago,

[5]It appears that during 1979 ten states adopted or modified abortion funding restrictions. *See* 8 *Family Planning/Population Reporter* 23 (April 1979) and 8 *Family Planning/Population Reporter* 73, 74 (October 1979).

[6]*Abortion Law Reporter*, Medicaid at 31.1-31.22. The figures given in the summary of this report, at 31.1 and 31.2, are somewhat misleading as to the actual abortion funding policies adopted by the states. The report notes, for instances, that as of December 12, 1978, nine states would pay for abortions when medically necessary as determined by the woman and her physician, but a review of the nine "medically necessary" standard states in the more extensive state-by-state analysis section of the report reveals that seven of these nine states are paying for such abortions under court orders which nullified state legislation or regulations essentially restricting the

(Footnote continued.)



approximately 66% of the states restricted funding of abortions on grounds as narrow, or narrower, than the Hyde Amendment, and approximately 80% of the states had adopted public policies (including those states where such policies were adopted but enforcement of them was restrained by court order) restricting abortions to essentially the same or narrower circumstances. And approximately 17 states, or approximately 34%, had enacted legislation or regulations essentially limiting abortions to those necessary when the life of the mother is endangered.[7] Clearly, the states have relied heavily on a clear holding and unambiguous rationale of the landmark funding decisions of 1977 in adopting and retaining these abortion funding restrictions.

C. Lower Federal Courts Have Relied Heavily Upon the Clear Rationale of *Maher* and *Poelker* in Upholding the Constitutionality of Various Abortion Funding Restrictions.

State legislators and administrators have not been alone in reading *Maher* and *Poelker* as authorizing abortion funding restrictions similar to those adopted by Illinois and the Federal Congress. Since those Supreme Court decisions were announced, ten lower courts have considered the constitutionality of various abortion funding restrictions. Besides the court below, only one federal court has held that abortion funding restrictions similar to those involved in this case are constitutionally prohibited. *See Doe v. Percy*, 476 F. Supp. 324 (W. D. Wis. 1979). In the other eight cases the lower courts perceived no constitutional barrier to upholding

(Footnote continued.)

expenditure of publid funds except when the life of the woman was endangered (or rape or incest involved). Except as otherwise indicated, these seven cases have not been taken account in arriving at the figures used in this paragraph of the text. However, the "miscellaneous" states of Iowa, Maryland and Arizona have been added to the essentially-Hyde Amendment category, while Oregon has been added to the category of states paying for all or most abortions. (These alterations are justified by the *Abortion Law Reporter's* own description of the laws of these four states.)

[7]*See supra*, note 6.

similar abortion funding restrictions. *See D.__ R.__ v. Mitchell*, 456 F. Supp. 609; *Woe v. Califano*, 460 F. Supp. 234; *Frieman v. Walsh*, No 77-417-Cv-C (W. D. Mo. Jan. 26, 1979); *Doe v. Mundy*, 441 F. Supp. 447 (E. D. Wis. 1977); *Doe v. Poelker*, 558 F. 2d 1346 (8th Cir. 1977); *Doe v. Westby*, Civ. 79-5017 (D.S.D. Feb. 27, 1978); *Doe v. Klein*, (no. 76-74 CD.N.J. June 27, 1977) (as discussed in *Abortion Law Reporter*, Medicaid 23.1 (12/78); and *Doe v. Klein*, No. 1-76-134 (D. Ida. 1977) (as discussed in *Abortion Law Reporter*, Medicaid 24.1 (12/78). *See also Lehocky v. Curators of the University of Missouri*, 558F. 2d 887 (8th Cir. 1977). A number of these cases involved lifting injunctions or modifying orders restraining enforcement of abortion funding restrictions that had been entered before *Maher*. *See*, e.g., *Doe v. Mundy, supra; Doe v. Westby, supra;* and *Doe v. Poelker, supra.*

Four of these cases involved essentially "lifesaving only" abortion funding restrictions. *D.__ R.__ v. Mitchell, supra; Woe v. Califano, supra; Doe v. Mundy, supra; Doe v. Klein*, No. 1-76-134 (D. Ida 1977). Furthermore, following the decision in *Maher*, this Court summarily affirmed a pre-*Maher* decision of the district court in Louisiana, upholding a lifesaving-only funding restriction. *Doe v. Stewart*, 433 U.S. 901 (1977). (See discussion of this case in *Abortion Law Reporter*, Medicaid 18.1 (12/77).)

In *D.__ R.__ v. Mitchell*, the district court upheld the constitutionality of Utah's "life-saving-only" abortion funding restriction which was intended by the Utah legislature to parallel the scope of the Fiscal Year, 1977 Hyde Amendment which was then in effect. After an extensive analysis of the constitutional issue, the court concluded, *inter alia*:

> There is no reason why the principle articulated in *Maher* should not control the disposition of the constitutional issues in this case. The key concept set forth in *Maher* is that there is a basic difference between state interference with protected activity and state encouragement of an alternative activity. Even though fewer abortions might be funded under Utah's statute, such a result would be constitutionally insignificant. If the State of Utah, under *Maher*, may make a choice favoring childbirth over abortion and implement that decision through the allocation of public funds, it may do so on any reasonable conditions. Given the state's strong interest in protecting the potential life of the fetus, encouraging normal childbirth and appropriately using state funds . . . the life-endangering standard . . . is entirely reasonable.



456 F. Supp. at 615.

In *Doe v. Mundy*, the court upheld a lifesaving-only county hospital abortion policy explaining:

> In plaintiff's opinion, the Supreme Court has defined a therapeutic abortion as one based on "medical necessity." . . . The plaintiff's claim that there can be no rational basis for the county's determination not to fund abortions when a woman's health or physical integrity is endangered. . . .
>
> . . . .
>
> The plaintiffs' assertion . . . does not account for the non-conforming definition of a nontherapeutic abortion in *Poelker*. . . . *Beal, Maher* and *Poelker* declared no constitutional violation in the failure to provide funding for medically necessary abortions.

441 F. Supp. at 451, 452. *See also Woe v. Califano*, 460 F. Supp. at 236. And in *Frieman v. Walsh*, the court concluded "that it is not violative of the Equal Protection Clause for a state to pay for an indigent's childbirth expenses while refusing to fund the expenses incurred by an indigent to obtain an abortion [except under the Hyde Amendment criteria]." Seip op. at 16.

III. *The Decision of the Court Below Cannot Be Reconciled With the Doctrine of Abortion Privacy Articulated in* Roe v. Wade *or* Maher.

A. There is No Constitutional Right To Funding of "Medically Necessary" Abortions.[8]

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[8]Nor does the Hyde Amendment (or the Illinois abortion funding restriction) violate the constitutional prohibition against the establishment

(Footnote continued.)

The right of abortion privacy articulated in *Roe v. Wade* protects a woman's private decision (i.e., protects the woman *in* her private circumstances) whether or not to have an abortion from governmental compulsion or undue restriction. *Maher*, 432 U.S. at 473, 474. It does not, however, grant a pregnant woman a right to be free from any governmental influence or exempt from the effects of any governmental policy whatever. And while *Roe v. Wade* states that a "life or health" exception is constitutionally required to any state prohibition of or restriction on abortion, this does not suggest that a woman has an affirmative right to a medically necessary abortion any more than *Roe's* holding that a woman has a right to choose to have an *elective* abortion during the first trimster means that she has a right to state-subsidized elective abortions then.

### B. The Ruling of the District Court Directly Undermines the Constitutional Doctrine of Abortion Privacy.

If the ruling of the district court is allowed to stand, it will directly undermine the delicate doctrine of abortion privacy which the Court took great pains to establish in *Roe v. Wade*. In *Roe v. Wade*, the Court held that there was no absolute right to an abortion. 410 U.S. at 153, 154. However, abortion prohibitions or unduly burdensome restrictions infringe upon a constitutionally protected right of privacy and can only be sustained if they are necessary to effectuate a compelling state interest. 410 U.S. at 153-155. The point at which state interests in prohibiting or restricting abortions become compelling varies with the stage of pregnancy. There is a constitutional presumption that all abortion prohibitions applicable before

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(Footnote continued.)

of religion. *See, e.g.*, Woe v. Califano 460 F. Supp. at 237. It is worth noting that a prominant early exponent of the constitutional entanglement theory which forms the basis of the First Amendment challenge to an abortion funding restriction has clearly and equivocally renounced that position. L. Tribe, *American Constitutional Law* 15-10 at 928 (1978).



the point of viability, except second-trimester medical restrictions, do *not* serve any compelling state interest; however, after the point of viability there is a constitutional presumption that abortion restrictions are necessary to effectuate compelling state interests in fetal life and maternal health. But even after viability the state may not prohibit abortions which are "necessary, in apporpriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 163.

The scope of this non-restrictable category of "medically necessary" abortion, applicable as it is even after the point of viability when the state has a compelling interest is very narrow. It must not be confused with the abortion-on-demand scope of "medically necessary" abortions that *must* be permitted under a statute that *forbids* any abortions during the *first* trimester. *Doe v. Bolton*, 410 U.S. at 192; *see also Roe*, 410 U.S. at 153. But, if the liberal parameters for determining "medically necessary" abortions established by the court below are transferred to the *Roe v. Wade* model of abortion regulation, that will destroy the constitutional doctrine of abortion privacy.[9] In essence, it will permit abortion on demand throughout pregnancy.

Of course, it may be suggested that the generous "medically necessary" abortion definition adopted by the district court was meant solely for use in the funding context and cannot be transferred to the mainline *Roe v. Wade* abortion doctrine. But

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[9]The dangers inherent in the unqualified language of "medical necessity" are reflected in the testimony of Jane Hodgson, M.D., during litigation on the Hyde Amendment. Dr. Hodgson, one of the plaintiffs seeking the invalidation of the Hyde Amendment testified as follows:

> In my medical judgement every [pregnancy] that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is not wanted.
>
> In good faith, I would recommend on a medical basis, you understand that, and it would be 100%. . . . I think they are all medically necessary. . . .

Transcript, Aug. 3, 1977, at 99-101, *McRae v. Califano*, No. 76-C-1804 (JFD) (E.D.N.Y.).

that would lead to an even more anamalous result: states would have the constitutional duty to subsidize abortions (because they were "medically necessary," under the district court definition) which under the *Roe v. Wade* doctrine they constitutionally may altogether prohibit (because they are not "medically necessary" abortions).

Moreover, the position of the court below is fundamentally at odds with the basic jural postulate that underlies the constitutional abortion doctrine, i.e., the doctrine of privacy. Privacy, as a constitutional doctrine, is result-neutral, i.e., it is neither pro- nor anti-abortion. It is essentially a protective concept, shielding the individual from the abusive or intrusive exercise of governmental powers.[10]

The position taken by the District Court cannot be justified by reference to the doctrine of privacy as we now know it. The Court obviously had this in mind when it stated, in *Maher*:

> [T]he right [of privacy] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy....
>
> The Connecticut regulation before us is different in kind from the laws invalidated in previous abortion decisions. The Connecticut regulation places no obstacle—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion sufffers no disadvantages as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependant on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that made it difficult—and in some cases impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*.

432 U.S. at 473, 474.

[10] The constitutional right of privacy is not an affirmative doctrine, it is not a doctrine of self fulfillment. Those who attempt to portray it as such misstake a beneficial function of the privacy doctrine for the constitutional doctrine itself.



That is not to say that there are not other possible jural postulates which might justify the position reached by the District Court. If the Constitution embodied fundamental values favoring zero population growth, total lifestyle freedom, or absolute economic equality, and if abortion were deemed to be necessary to achieve those ends, the decision of the lower court would be sustainable. To date, however, this Court has not adopted any such constitutional values, nor endorsed any such *pro*-abortion jural postulates.

## IV. *Neither The Illinois Abortion Funding Restriction Nor the Hyde Amendment Violates the Equal Protection Doctrine.*

The court below correctly observed that inasmuch as the abortion funding restrictions do not impinge upon any fundamental constitutional right or suspect classification, the apporpriate standard of judicial scrutiny is the "rational relation" standard of analysis. 469 F. Supp. at 1216-1218. Unfortunately, however, the court failed to properly apply the standard of analysis it had identified.

The district court reasoned, in part:

> Under *Maher*, a state may legitimately prefer childbirth to an elective abortion. We do not believe, however, that a state has a legitimate interest in promoting the life of a non-viable fetus in a woman for whom an abortion is medically necessary. This approach, which recognizes that the fetus is being carried within a living, human being, is consistent with Supreme Court decisions which suggest that the interest in the fetus cannot be isolated from the interest in the health of the mother....
>
> As a consequence of the state's viewing the fetus apart from the mother, the mother may be subjected to

> considerable risk of severe medical problems, which may even result in her death....

469 F. Supp. at 1219. Since the Illinois Abortion funding restriction and the Hyde Amendment would delay needed medical treatment for indigent mothers until the risk to the mother's life was substantial, it imposed a constitutionally unreasonable cost on indigent women. Therefore, the court reasoned, the state's interest in protecting the potential life of the fetus was not only not compelling, but it was not even "legitimate." "For the reasons just discussed, a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate." *Id.* at 1221.

The district court seems to have fallen into error, at least in part, because of its inability to hold fast to the concept that restrictive funding provisions are not direct prohibitions of abortions, and that there is a constitutionally significant distinction between refusing to pay for certain abortions and directly prohibiting the performance of the same. Thus, in support of its argument that "the interest [of the state] in the fetus cannot be isolated from the interest of the mother," the court below relied upon the Supreme Court decisions in *Roe v. Wade* and *Colautti v. Franklin*, 439 U.S. 379 (1979), both cases involving statutes directly prohibiting certain abortion practices. Likewise, when the court observed: "We cannot hold that the state has a legal interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent women" it appears to have forgotten that neither the Illinois abortion funding restriction nor the Hyde Amendment imposes "increased maternal morbidity and mortality among indigent woman"—they simply fail to extend public assistance to relieve indigent women of problems caused, *inter alia*, by the private fee structure of the medical and fertility service industries.



The conclusion of the Court below that a state does not have "a legitimate interest in protecting the life of a non-viable fetus in a woman for whom an abortion is medically necessary [in any doctor's opinion]" flies directly in the fact of the holding of this Court in *Poelker*.[11] The suggestion that a state may not "separate" the interest of the fetus from that of the mother prior to the point of viability defies the holding of this court in *Maher*:

> *Roe* itself explicitly acknowledged the state's strong interest in protecting the potential life of the fetus. That interest *exists throughout pregnancy, 'grow[ing] in substantiality as the woman approaches term.'... The state unquestionably has a 'strong and legitimate interest*

[11] The court below, in a footnote, 469 F. Supp. at 1219 n.9., attempted to distinguish *Poelker* but the attempt is unsuccessful because it is based on two significant factual misconceptions. The district court argued that since the particular representative plaintiff in *Poelker* did not have "any medical reason to justify an abortion," the Supreme Court really only upheld the St. Louis policy as applied to her only, and did not imply that women who had medical reasons for abortions could be excluded under that policy. This argument, however, overlooks the fact that *Doe v. Poelker* was a class action, and the class apparently included women who had medical problems for which an abortion might be "indicated," though not "necessary" under the strict St. Louis guidelines. *See generally Doe v. Poelker*, 515 F. 2d 541, 546 (8th Cir. 1975). Moreover, the suggestion of the court below that "physicians could not find any 'medical reason to justify an abortion'" for the named-plaintiff is misleading. The Court of Appeals in that case found, based on medical evidence presented in the record, that "Doe was suffering from cervical fibroid tumors and polyps, an extremely retroverted uterus and trichomycosis." 515 F.2d at 543. The real problem was that under that stringent standard of "medical necessity" promulgated by the city of St. Louis, none of the doctors from the Jesuit-run medical school would certify than abortion for the plaintiff, even in those circumstances, was "medically necessary".

In fact, the underlying question in *Doe v. Poelker* was the same as the core question in the instant case: whether the elected representative of the people can define "medically necessary" abortions so narrowly that public funds will subsidize abortions in extremely serious cases only, or must the parameters of the class of "medically necessary" abortions that will be publicly subsidized, as well as the medical judgment whether a particular case falls within those parameters, constitutionally be left to the sole discretion of the pregnant woman's physician. The holding of the court below squarely contradicts the holding of the Supreme Court in *Poelker* on this point.

*in encouraging normal childbirth' . . . an interest honored over the centuries.*

432 U.S. at 478 (emphasis added). Furthermore, in the companion case of *Beal v. Doe* 432 U.S. 438 (1977) the Court held:

> [T]he state has a valid and important interest in encouraging childbirth. . . . That interest alone does not, at least until approximately the third trimester become sufficiently compelling to justify an unduly burdensome state interference with the woman's constitutionally protected privacy interest. *But it is a significant state interest existing throughout the course of the woman's pregnancy."*

432 U.S. at 445, 446 (emphasis added). In fact, in *Maher* the Court noted several *other* legitimate policy interests which could be furthered by a policy of public funding inducements favoring childbirth over abortion. 432 U.S. at 478 n.11. Thus, to accept the ruling of the Court below that these state interests are not even "legitimate" would require a direct repudiation of the holding and rationale of cases decided by this Court less than 3 years ago.[12]

## V. *The Public Welfare Will Be Profoundly Disserved If States Participating in the Medicaid Program Are Required to Subsidize "Medically Necessary" Abortions.*

If this Court upholds the ruling of the court below that Illinois must provide more extensive funding of certain medical services because, in the opinion of a federal judge (and contrary to the conclusion of the responsible state officials) they are "medically necessary," it will have ramifications that extend far beyond the abortion context. How many other

[12] There is no question that a funding restriction rationally relates to these interests. *Maher*, 432 U.S. at 479. While it may be true that abortion funding is more restrictive than the funding of other surgical procedures, "[t]he simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life" *Maher*, 432 U.S. at 480. *See also* Judge Anderson's excellent analysis of this point in D.__ R.__ v. Mitchell, 456 F. Supp. at 611-615.



medical services are participating states now not funding that might, in the opinion of the next judge, be considered "medically necessary"? If the ruling of the court below is upheld, it will serve as an open invitation to a deluge of litigation, and invite judicial expansion of mandatory Medicaid funding for a vast panoply of other services to an extent that could demolish the medical assistance program.

The ruling of the court below disregards the crucial distinction between "medically necessary" and "medically desirable" abortions. The district court erroneously concluded that the Illinois abortion funding restriction and the Hyde Amendment violate equal protection doctrine because, without furthering a legitimate state interest, "indigent women in medical need of abortions are treated differently than indigent women in medical need of other surgical procedures. . . ." 469 F. Supp. at 1218. The lower court's analysis, however, is built upon the bald assumption, nowhere defended or discussed in the opinion, that these abortion funding restrictions do not adequately subsidize "medically necessary" abortions.[13]

This predicate of the district court ignores the clear indication in the 1977 funding cases of this Court that there is a fundamental distinction between "medically *necessary*" and "medically *desirable*" abortions. In *Maher*, *Poelker* and *Beal*, the court used these terms, and their respective synonyms, ("therapeutic" and "non-therapeutic" or "elective"), for contrast, to describe the opposite ends of the spectrum of possible abortion funding schemes. *See Beal*, 432 U.S. at 444, 445; *Maher*, 432 U.S. at 466, 480; and *Poelker*, 432 U.S. at 520, 521. "Necessary" connotes compulsion, obligation, unavoidable, or lack of alternatives. "Desirable" connotes preferable, attractive, pleasing, or wishful. These concepts are

[13] *See generally* 469 F. Supp. at 1219: "The Connecticut statute differed from the Illinois statute challenged here becuase it provided for the funding of 'medically necessary' abortions. We believe this distinction to be *crucial* to the determination of the case." (emphasis added.)

not mutually exclusive, as a "need" may be "desired," and a "medically necessary" procedure usually will be "medically desirable" also. But when used to suggest a contrast, as in the Supreme Court decisions, these phrases mark the opposite poles of the spectrum of personal (and, in this instance, medical) volition. The court below simply erred in assuming that the class of "medically necessary" abortions constitutionally must include a greater range of "medically desirable" abortions than the Illinois and federal legislatures would subsidize.

Finally, this Court should be most reluctant to read into Title XIX of the Social Security Act (either by statutory or constitutional construction) a requirement not expressed there that states are required to fund all "medically desirable" services or even all "medically necessary" services. The futility of imposing such a requirement judicially, especially when there is neither legislative nor medical consensus as to the limits of necessity, is well illustrated in the history of the abortion funding litigation. Similar potential litigation lurks within Title XIX concerning a vast array of other medical services.



## CONCLUSION

For the reasons set forth above, this Court should reverse the ruling of the district court and explicitly hold that the Illinois abortion funding restriction, as enacted, and the Hyde Amendment do not contravene the right of abortion privacy or the equal protection guarantees of the United States Constitution.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

State of Utah )
) ss
County of Utah )

I, Lynn D. Wardle, one of the attorneys for Amicus Curiae, being a member of the Bar of the Supreme Court of the United States, do hereby certify that all parties required to be served have been served and that I caused true and correct copies of the foregoing brief to be served upon counsel of record for the Appellants and Appellees in these consolidated cases in accordance with Rule 33 of the Rules of Supreme Court of the United States by depositing such briefs this day in a United States Postal Service mailbox, with first-class (airmail) postage prepaid, addressed to the following:

Dennis J. Horan, John D. Gorby, Victor G. Rosenblum, Patrick A. Trueman and Thomas A. Marzen, Americans United for Life Legal Defense Fund, 230 North Michigan, Suite 515, Chicago, IL 60601; William J. Scott, Attorney General of the State of Illinois and William A. Wenzel, III, 160 North La Salle Street, Chicago, IL 60601; Aviva Futorian, Robert E. Lehrer, Wendy Meltzer, and James D. Weill, Legal Assistance Foundation of Chicago, 343 South Dearborn Street, Chicago, IL 60604; Robert W. Bennett 357 East Chicago Avenue, Chicago, IL 60611; Lois J. Lipton and David Goldberger, Roger Baldwin Foundation of ACLU, Inc., 5 South Wabash Ave., Chicago, IL 60603, and Wade H. McCree, Jr. Solicitor General, Department of Justice, Washington, D.C. 20530.

All done this 9th day of January, 1980.

Lynn D. Wardle